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Inventor(s): Olaf Isele et al.

S.N.: 09/895,027

Filed: June 29, 2001

Docket #: 8610

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## IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application No.	:	09/895,027
Applicant(s)	:	Olaf Isele, et al.
Filed	:	June 29, 2001
Title	:	Top-Biased Beneficial Components on Substrates
TC/A.U.	:	1615
Examiner	:	L.S. Channavajjala
Conf. No.	:	7458
Docket No.	:	8610
Customer No.	:	27752

REPLY BRIEF

Mail Stop Appeal Brief - Patents  
Commissioner for Patents  
P. O. Box 1450  
Alexandria, VA 22313-1450

Dear Sir,

This Reply Brief is filed pursuant to the Examiner's Answer from the U.S. Patent and Trademark Office dated February 9, 2005. This Reply brief is deemed to be timely filed since April 9, 2005 was a Saturday and April 11, 2005 is the first business day thereafter.

ARGUMENTS

1. Grouping of Claims The Office states that "claims 1-3 and 5-21 stand or fall together because appellant's brief does not include a statement that this grouping of claims does not stand or fall together and reasons in support thereof. See 37 CFR 1.192(c)(7)." Section 1.192 of Title 37 of the Code of Federal Regulations was removed effective September 13, 2004. No equivalent requirement is recited in 37 C.F.R. § 41.67 entitled "Appellant's Brief."

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2. The Office has failed to present factual support or a convincing line of reasoning in support of a reasonable expectation of success for the Office's proposed modification. The Office argues that since Krzysik teaches that the lotion can be applied at 0.05-100 mg/cm<sup>2</sup>, "it would have been within the scope of a skilled artisan to optimize the *amounts* of lotion applied on the absorbent article" and that "[t]he expected result would be a minimum migration of the solidified components applied to the bodyside liner." *Office Action of July 20, 2004*. Appellant has argued that the Office has provided no factual basis for the assertion that optimizing the *amount* of lotion applied on an absorbent article will produce the expected result of minimum migration of the solidified components to the bodyside liner. *Appellant's Brief of December 20, 2004, paragraph A2*. In response, the Office states, "[E]xaminer showed that Krzysik teaches that the minimum migration of the lotion formulation is no more than 55% (page 17) . . . [t]hus, it is clear that both the instant invention and Krzysik desire the same result." *Examiner's Answer of February 9, 2005, page 6*.

However, the line which the Office cites, page 17 of Krzysik, refutes the Office's assertion. Krzysik states, "[T]he articles having the lotion formulations of the present invention applied to there [sic] bodyside liner define a z-direction migration loss of no more than about 55%." The Office is using this teaching to support the notion that the *amount* of lotion applied to the liner (i.e., 0.05-100 mg/cm<sup>2</sup>) results in the recited z-direction migration loss. Krzysik clearly states that it is the lotion *formulation* that defines the z-direction migration loss. The Office has pointed to nothing to suggest that the *amount* of lotion defines the z-direction migration loss. The Office has provided no support for its assertions that "it would have been within the scope of a skilled artisan to optimize the *amount* of lotion applied on the article. The expected result would be minimum migration." *Examiner's Answer of February 9, 2005, page 4*. The Office's assertion does not meet the "burden of proof on the Patent Office which requires it to produce the factual basis for its rejection of an application under sections 102 and 103." *In re Warner*, 379 F.2d 1011, 1016 (CCPA 1967). The assertion posited by the Office continues to be based on mere subjective expectation that is neither convincing nor supported in fact.

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3. Misinterpretation of the z-Direction Lotion Migration Test. The Office's reliance on the z-direction lotion migration test of Krzysik is misplaced and a skilled artisan would recognize the limitations of the z-direction lotion migration test. Appellant has presented support for the assertion of misinterpretation by the Office in the Appeal Brief. *See Section A.3., pages 4-6.* As stated in the Appeal Brief, the z-direction lotion migration test is unable to determine the lotion concentration present in thicknesses of the sample between  $0 - 1/3Z$ ,  $1/3Z - 2/3Z$ , or  $2/3Z - Z$ , when  $Z$  is the measured thickness of the sample. Furthermore, the z-direction lotion migration test cannot isolate migration in the z-direction alone. Krzysik states that the test predicts, in part, "how quickly [the lotion] will undesirably migrate away from or *along* the body facing surface of the article in use." *Krzysik*, page 21, lines 13-16. To summarize, the z-direction lotion migration test cannot: (1) determine lotion presence at certain thicknesses of the sample, it can only determine lotion presence in the sample as a whole and (2) determine if lotion migration is due to migration in the z-direction alone. One skilled in the art would recognize these shortcomings of the z-direction lotion migration test and would not read into the test the assertions that the Office makes.

Furthermore, it must be noted that one skilled in the art, upon full consideration of Krzysik, would not read as much breadth in the z-direction lotion migration loss as does the Office. Example 1, which is the sole embodiment of the Krzysik invention subjected to the z-direction lotion migration test, shows a migration loss of 44.3%. One skilled in the art would recognize that the Krzysik reference discloses an enabled z-direction migration loss of 44.3% and would not read any further migration loss from the disclosure absent undue and excessive experimentation. As a result, the Office's continued reliance on the z-direction lotion migration test is misplaced.

4. The reference relied upon by the Office fails to teach Appellant's limitation of "the beneficial component comprises at least a first layer and second layer" as recited in Claim 1. Throughout prosecution, the Office has asserted that "WO [Krzysik] does not explicitly teach layers of beneficial component." *See Office Action of July 20, 2004, page 3 and Office Action of December 1, 2003, page 3.* The Office, in the Reply Brief, now states that "Krzysik teaches treating the surface of the article with a surface-active agent

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(constituting first beneficial layer, followed by lotion formulation (second beneficial agent).” *Examiner’s Answer, page 8*. The basis for this rejection has changed such that Appellant has not had a fair opportunity to react to the rejection in the course of prosecution. Appellant asserts that this new grounds for the rejection should not be entered. Alternatively, Appellant asserts that prosecution should be reopened such that the new grounds for rejection can be addressed.

Furthermore, the Office has reiterated that “applicants have not shown any unexpected results with the beneficial component being in the form of layers as opposed to being applied as a single composition.” *Examiner’s Answer, page 8*. In response to Appellant’s evidence of an unexpected result on page 23 of the specification, the Office stated, “[T]he results are specific to water and glycerine and do not include any of the beneficial agents claimed.” The Office is directed to page 9, line 30 of the specification listing “glycerol” as a conditioning agent, which itself is a beneficial component. Glycerine and glycerol used interchangeably within the chemical arts. As a result, ample support exists for the unexpected result.

#### SUMMARY

It is respectfully submitted that Claims 1-3 and 5-21 have not been properly rejected under 35 U.S.C. § 103. Based on the Appeal Brief submitted on December 20, 2004 and the arguments presented above, Appellant respectfully request the Board of Patent Appeals and Interferences to reverse the rejections of Claims 1-3 and 5-21 and to remand the application with instructions that these claims be allowed over the cited documents.

Respectfully submitted,

THE PROCTER & GAMBLE COMPANY



Signature

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Date: April 11, 2005  
Customer No. 27752  
8610 Reply Brief 04-11-05 (final).doc